No. 12283

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM AVERBUCK, ELVADOR G. GREENFIELD and HORACE MORTON NEWMAN, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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TOPICAL INDEX

PAGE

Jurisdictional statement 1

Statement of the case 1

The questions involved 14

Argument 16

Summary 16

Point I. An officer of the Communist Party has no constitutional right under the privilege clause of the Fifth Amendment to refuse to testify concerning the books and records of the organization 19

A. There is ample proof in the record that Dorothy Healey was an officer of the Los Angeles County Communist Party 19

Point II. The privilege against self-incrimination may not be asserted on behalf of third persons 31

Point III. Appellants would have obtained automatic immunity by operation of law, had they testified 36

A. Any testimony a witness is compelled to give before a grand jury by order of court, would not be admissible against him in any criminal proceedings, except perjury 36

1. Any criminal proceeding means—a proceeding arising out of past offenses, in relation to the time of inquiry 36

B. The appellants herein were expressly offered a broad and complete immunity from any prosecution arising out of their testimony herein by the United States Attorney and the Special Assistant to the Attorney General 44

PAGE

Point IV. Appellants had no reasonable grounds to claim privilege of silence concerning the Los Angeles Communist Party organization or its officials 47

Point V. The District Court committed no error in ordering appellants to answer the questions before the grand jury 53

A. Appellants were not entitled to assert the privilege of self-incrimination on the possibility that answers to the questions might connect them with the Communist Party 53

Conclusion 67

Appendices:

Appendix A. Executive Order No. 9835, dated March 25, 1947 .....App. p. 1

Appendix B. The Smith Act.....App. p. 2

TABLE OF AUTHORITIES CITED

Cases	Page
Anderson v. United States, 318 U. S. 350	36
Berger v. United States, 295 U. S. 78	46
Blair v. United States, 250 U. S. 273	26, 41, 43, 49
Blau v. United States, 180 F. 2d 103	2, 58
Bridges v. Wixon, 326 U. S. 135	59, 60
Brown v. United States, 276 U. S. 134	19, 25
Brown v. Walker, 161 U. S. 591	34, 49, 50
Commonwealth v. Southern Express Co., 160 Ky. 1	26
Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 889	65
Consolidated Mines of California v. Security Exchange Commission, 97 F. 2d 704	30
Dreier v. United States, 221 U. S. 394, 31 S. Ct. 550, 55 L. Ed. 784	29
Dunne v. United States, 138 F. 2d 137	58
Foster et al. v. United States, aff'd U. S. Ct. of Appeals, 2d Cir., ... F. 2d ....., (August, 1950)	55, 56, 58, 62, 67
Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652	20
Heicke v. United States, 227 U. S. 131	28
Hendricks v. United States, 223 U. S. 178	43
Irvine, Ex parte, 74 Fed. 954	26
Lawson and Trumbo v. United States, 176 F. 2d 49; cert. den. 339 U. S. No. 2 Adv. Sheets 934	64
Loubriel v. United States, 9 F. 2d 807	33
Mason v. United States, 244 U. S. 362	49, 51, 52
McNabb v. United States, 318 U. S. 332	36, 37
Mitchell's case, 12 Alb. Pr. 249	26
New York Poultry Company case, 34 F. 2d 967	29
O'Connell v. United States, 40 F. 2d 201	51
People v. Noble, 68 Cal. App. 2d 853, 158 P. 2d 225	65
Regina v. Boyes (Eng.), 1 B. & S. 311	47

PAGE

Schneiderman v. United States, 320 U. S. 118 ..... 59, 60, 62
The Queen v. Boyes (Eng.), 1 B. & S. 311 50
United States v. Austin-Bagley Association, 31 F. 2d 229 28
United States v. Collins, 145 Fed. 709 26
United States v. Foster et al., 9 F. R. D. 363, 83 Fed. Supp. 197 55
United States v. Illinois Alcohol Co., 45 F. 2d 145 29
United States v. Levy, 153 F. 2d 995 46
United States v. Lovett, 328 U. S. 303 59
United States v. Lumber Products Association, 42 Fed. Supp. 910 ..... 27, 28, 29
United States v. Watson, 266 Fed. 736 19
United States v. White, 322 U. S. 694 ..... 19, 20, 21, 31
Willie, In re, 25 Fed. Cas. No. 14692e, p. 38 49
Wilson v. United States, 221 U. S. 361 ..... 19, 22, 29, 31
Zinser v. Federal Petroleum Board, 148 F. 2d 993 30

MISCELLANEOUS

Constitution of the Communist Party of the United States of America, Art. IX, Sec. 2 (1945) 67
Executive Order No. 9835 (12 F. R. 1935) 37, 54
Saturday Evening Post, Aug. 12, 1950, p. 17, Alexander, The Ordeal of Judge Medina 57

STATUTES

California Corporations Code, Secs. 35000-35302 (Deering, 1948) 65
Espionage Act of 1917 (40 Stat. 217, 50 U. S. C., Secs. 31-42) 66
Federal Rules of Criminal Procedure, Rule 5 37
Federal Rules of Criminal Procedure, Rule 37(a) 1
McCormack Act of 1938 (52 Stat. 631, 22 U. S. C., Secs. 611-21) 63

PAGE

Penal Code, Secs. 821-829 37
Penal Code, Sec. 847-849 37
Revised Statutes, Sec. 102 (11 Stat. 155) 22
Taft-Hartley Act (61 Stat. 146, 29 U. S. C. A., Sec. 159(h), Supp. 1947) 66
United States Code, Title 2, Sec. 192 22
United States Code, Title 18, Sec. 595 37
United States Code, Title 18, Sec. 2385 57
United States Code, Title 18, Sec. 3486 ..... 25, 38, 64
United States Code, Title 28, Sec. 1291 1
United States Code, Title 28, Sec. 1294(1) 1
United States Constitution, Fifth Amendment 20, 31, 32
Voorhis Act of 1940 (54 Stat. 670, 8 U. S. C., Secs. 451-460) 64
Voorhis Act of 1940 (54 Stat. 1201, 18 U. S. C., Secs. 14-17) 63

TEXTBOOKS

2 Bryce, The American Commonwealth (1915), p. 334 61
47 Columbia Law Review (1947), p. 416 64
33 Cornell Law Quarterly (1948), p. 565 64
40 Harvard Law Review (1926), p. 153 64
1 Stanford Law Review, No. 1 (Nov. 1948), pp. 88-89 37
1 Stanford Law Review, No. 1 (Nov. 1948), p. 94, Control of Communist Activities 63, 64, 65, 66
3 Wigmore on Evidence, Sec. 823, pp. 248-249 37
3 Wigmore on Evidence, Sec. 826, p. 255 37
8 Wigmore on Evidence, p. 405 48
Wigmore on Evidence (3rd Ed.), Sec. 2192 24
8 Wigmore on Evidence (3rd Ed.), Sec. 2259a 20
9 Wigmore on Evidence, Sec. 2550, p. 501 37

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Jurisdictional Statement.

These are appeals from judgments for contempt of court, criminal, in the United States District Court for the Southern District of California, Central Division. This Court obtains jurisdiction of the appeal by virtue of Title 28, U. S. C., Sections 1291 and 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

Statement of the Case.

Appellants Healey, Appelman, Averbuck, Greenfield and Newman were convicted of criminal contempt because they refused to obey the order of the Court and answer certain questions before the Federal Grand Jury. Except

in the case of appellant Healey, the issues of law here on appeal are similar to those in the case of *Kasinowitz, Steinberg and Dobbs,* No. 12217, in which Opinions were handed down, bearing the dates of February 4, 1950, and April 21, 1950. In that case the District Court was reversed, Chief Judge Denman having written the April 21st Opinion, Judge Pope concurring in the result only, and Judges Mathews, Healy and Bone dissenting.

A petition for certiorari in that case has been filed with the United States Supreme Court to review that judgment in the October Term, 1950.[1]

In the present case the matter of the criminal contempt of Dorothy Ray Healey stands apart from that of the other appellants. The Grand Jury presentment was as follows:

"In the Matter of:

Witness Dorothy Ray Healey

Criminal Contempt

Section 401, Title 18, U. S. Code.

The Grand Jury of the United States of America for the Southern District of California, Central Division, September Term, 1948, upon their oath present:

1. That on or about the 25th day of October, 1948, the Grand Jury for the United States of America duly empanelled and sworn, in the District Court of the United States for the Southern District of California, Central Division, at the September,

---

[1]Certiorari has been granted on May 15, 1950, No. 22, Oct. Term, 1950, in the similar case of *Patricia Blau v. United States,* 180 F. 2d 103, from the 10th Cir. which affirmed the judgment of the District Court.

1948, Term, undertook an inquiry concerning certain employees of the United States Government, who had made false statements to an agency of the Government, in a matter within the jurisdiction of that agency and in connection with the investigation of their loyalty to the Government, in violation of old Section 80, Title 18, U. S. Code, Revised Title 18 U. S. Code, Section 1001, and other criminal laws of the United States. In pursuance of such inquiry, it became necessary for said Grand Jury to inquire into and ascertain the official identity of one Dorothy Healey; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization.

Further the Grand Jury presents:

2. That Dorothy Ray Healey was subpoenaed and appeared as a witness before said Grand Jury and on May 26, 1949, then and there refused to answer certain questions propounded to her, she claiming that the answers thereto may tend to incriminate her.

3. Thereafter she appeared before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on the 9th day of June, 1949, in open court where the claim of privilege of the witness Dorothy Ray Healey was challenged by the Government. The Court then heard the questions propounded to the witness, and the answers she made to said questions. Thereafter, the said witness was offered an opportunity to be heard by the Court, privately in chambers as to how her privilege against self-incrimination would be violated by answering said questions, but the witness did not avail herself of the opportunity.

4. The Court found that there was no present danger of such tendency to incriminate the said wit-

ness Dorothy Ray Healey, and on June 11, 1949, ordered her to return before the Grand Jury on June 14, 1949, and answer the said questions (upon which she claimed her aforesaid privilege), namely:

(1) Will you tell us who you are organizer for?

(2) Now, Mrs. Healey, do you know who has the books and records of the Los Angeles County Communist Party?

(3) Can you tell us, Mrs. Healey, whether or not the Los Angeles County Comunist Party has a chairman?

(4) Can you tell us whether or not it has an organizational secretary?

(5) Can you tell us whether or not it has an educational director?

(6) Can you tell us whether or not it has a labor director?

(7) Can you tell us whether or not the membership or social director would have a list of the members of the Los Angeles County Communist Party?

(8) Can you tell us whether or not they have a financial director?

(9) Can you tell us whether or not the financial director would have a record of the dues paid by the members of the Los Angeles County Communist Party?

(10) Can you tell us who has the record showing the dues paid by the membership of the Los Angeles County Communist Party?

(11) Now, Mrs. Healey, can you tell us the name of anyone who can give us that information I just asked you?

(12) But that information is available, is it not?

(13) Can you tell us how many divisions there are in the Los Angeles or the Los Angeles County Communist Party?

(14) Can you tell us how many sections there are in the divisions?

(15) Can you tell us how many clubs there are?

(16) Can you tell us how many squads there are?

(17) Mrs. Healey, can you tell us who is chairman of the eastern division of the Los Angeles County Communist Party?

(18) Can you tell us who is the chairman of the midtown division of the Los Angeles County Communist Party?

(19) Can you tell us who is the head of the southern division of the Los Angeles County Communist Party?

(20) Can you tell us who is the head of the western division of the Los Angeles County Communist Party?

(21) Can you tell us who is the head of the youth division of the Los Angeles County Communist Party?

(22) Can you tell us who is the head of the student section of that youth division?

(23) Mrs. Healey, each division has a chairman, does it not?

(24) Or sometimes called an organizer?

(25) Does each division have an organizational secretary?

(26) Does each have a membership or social secretary?

(27) Does each have a membership or social director?

(28) Does the membership or social director of each division have a list of the membership of that division?

(29) Does each division have a financial director?

(30) Do not the membership director and the financial director have the books and records of the Los Angeles County Communist Party?

(31) Same as question No. 2.

(32) Now, that statement with reference to Mrs. Dorothy Ray Healey, the organizational secretary of the Los Angeles Communist Party, is that designation correct with reference to you?

(33) What is your business address?

(34) You are in charge of those records, are you not?

No.

Who is?

(35) Are these records in the place of business where you work?

(36) Do you know who does have control over the records?

5. Further the Grand Jury presents that on the 14th day of June, 1949, the said Dorothy Ray Healey was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters heretofore described, and again each of the said questions hereinabove listed which the Court ordered her to answer, were asked of the said witness, who then persistently refused to answer said questions, stating categorically that she refused to answer each of the questions on the ground that it would incriminate her.

6. That the said Grand Jurors, upon their oaths, present: That the said Dorothy Ray Healey, a witness before this Grand Jury, has given an obstructive, evasive and contumacious answer to each of the said questions propounded to her before said Grand Jury; that each of said questions was proper and material to the Grand Jury's inquiry and that no one or all of said questions would tend to incriminate the said witness of a violation of a federal offense; that the answer to each of said questions operated to shut off and block the instant inquiry, and block the search for truth; and the said witness has wilfully, deliberately and contumaciously obstructed the investigation of said Grand Jury in the matter hereinabove set forth by failing and refusing to answer each of the aforesaid proper and material questions put to her in the proceeding before the Grand Jury, which the Court ordered her to answer.

The Grand Jury therefore respectfully prays the Court to invoke its punitive power against said witness to maintain the proper functioning of the court and the Grand Jury and that it exercise such powers so that the court's act may serve as a deterrent on other recalcitrant witnesses.

/s/ R. B. Ahlswede,
Foreman.

/s/ James M. Carter,
U. S. Attorney.

/s/ M. H. Goldschein,
Special Assistant to the
Attorney General.

Filed June 14, 1949."[2]

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[2]Transcript of Record, pages 15 to 21, inclusive; see also pages 59 to 72, inclusive.

Although Healey denied that she had the books and records of the Communist Party of Los Angeles County or ever had such records [R. 70][3] yet there is ample proof in the record that she had access to said records, knew their contents, and the Court could infer she must have known who did have them if she didn't.

One Government witness by the name of Adrean was called to testify in the hearing before the Court [R. 102-103]. He stated he was a graduate of the University of Southern California; that he joined the Communist Party here in June 1942 but resigned from it in 1947; that he was a club organizer and educational director of a couple of clubs, and that in connection with his activities in the Communist Party he learned the officers of the party in Los Angeles. Further, he testified that he knew Dorothy Healey and identified her in the courtroom [R. 106] that she was "Organizational Secretary and Membership Director" [R. 103]. That she has a controlling or executive position in the Communist Party [R. 104]; that she is in control of the day to day activities of the party; the membership and its officers [R. 105] that he had been in her office at 124 W. Sixth Street, in Los Angeles [R. 105]; that the head of the Los Angeles Communist Party was Nemmy Sparks whose title was "Chairman of the County Central Committee"; and Dorothy Healey was next in charge as "Organizational Secretary" [R. 107].

Adrean further testified that he had to report to her in order to be assigned to a club [R. 108]; also that under her comes the various sections of the party and they are

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[3]References preceded by the letter "R" refer to the Printed Record on Appeal.

headed by organizers, who serve as functional officers, too [R. 108]; further that they had a mimeographed sheet that came around on which he had to state his name or his Party name [R. 109]. Also, he stated that a statistical sheet was filled out containing information as to what his club location was, his occupation, whether he belonged to a fraternal organization, a trade union and whether he was a veteran—so that they would know how many people were located in a particular industry, or trade union in order to organize activities within these various organizations [R. 110]. The statistical data (sheet) is turned over to the club organizer and it was delivered through regular party channels [R. 111].

A subpoena *duces tecum* was served upon Healey to produce said books and records, memoranda and files of the party, particularly those showing membership in, or dues paid by members to the Communist Party of Los Angeles. She stated she did not have and never had any such records[4] [R. 70]. Then she was asked if she knew who had the books and records of the party (questions (2) and (31), of presentment [R. 17 and 19]) also questions 10 and 28 related directly to said records which questions Healey refused to answer on the ground that it might be self-incriminating [R. 61, 62 and 64].

Dorothy Healey did answer the question "Now, you are not a Federal employee, are you?" by saying, "I am not"

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[4]Since Healey never produced the records of the party, and maintained she did not have control over them, the demand to do so was not pressed and the Government's motion for an order of the court compelling production was taken off calendar. Therefore, noncompliance with the subpoena *duces tecum* to produce said records is not a basis of the contempt herein.

[R. 60], and that her husband was not and never has been a Federal employee [R. 68].

As to appellant Appelman the Grand Jury presentment contained certain questions which he refused to answer on the ground that the answers might tend to incriminate him, as follows:

> "(1) 'Do you know that Dorothy Healey is the organizational secretary of the Los Angeles County Commitee of the Communist Party?'
>
> (2) 'Do you know who the chairman of the Los Angeles County Communist Party is?'
>
> (3) 'Do you know who the membership director of the Communist Party is?'
>
> (4) 'Do you know who the financial director of the Los Angeles County Committee of the Communist Party is?'
>
> (5) 'Do you know anything about the sections?'
>
> (6) 'Can you tell us whether each section has an organizer?'
>
> (7) 'Can you tell us the names of any of the section organizers of the Los Angeles County Communist Party?'
>
> (8) 'Can you tell us whether each section has a membership director?'
>
> (9) 'Where have you used that name (Matt Pelman)?'
>
> (10) 'Have you ever been to their offices in Los Angeles? (The Los Angeles County Committee of the Communist Party.)'
>
> (11) 'Did you know who was in charge when you were living here? (The Los Angeles County Committee of the Communist Party.)' "[5]

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[5]R. 2-6, inclusive.

A presentment similar to that pertaining to Healey and Appelman was made as to Averbuck, in which he refused to answer certain questions, claiming privilege, as follows:

"(1) What name is on the door (at 124 W. 6th St.)?

(2) Do you know Mrs. Dorothy Healey?

(3) Mr. Averbuck, do you know who has the books and records of the Los Angeles County Communist Party?

(4) Now, do you know how many divisions of the Los Angeles County Communist Party there are?

(5) Do you know the names of any of the chairmen of any of the divisions of the Los Angeles County Communist Party?

(6) Do you know the names of the membership or social organizers of any of the divisions of the Los Angeles County Communist Party?

(7) Do you know the names of the financial organizers or financial directors of any of the divisions of the Los Angeles County Communist Party?

(8) Do you know the names of the officials of any of the divisions of the Los Angeles County Communist Party that have the books and records of that division of the Communist Party?

(9) Did you ever see Mrs. Dorothy Healey with any of the books or records of the Los Angeles County Communist Party?

(10) What did you say your occupation was?

Organizer.

For whom?"[6]

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[6]R. 6 to 10, inclusive.

A similar presentment was returned as to appellant Greenfield who claimed privilege and refused to answer the following questions:

"(1) 'Now, do you know who has the books and records of the Los Angeles County Communist Party?'

(2) 'Was that the first time you ever saw her? (Dorothy Healey.)'

(3) 'Does she have the books and records of the Los Angeles County Party, do you know?'

(4) (Same question as #1.)

(5) 'Mr. Greenfield, do you know whether or not the Los Angeles County Communist Party is divided up into divisions?'

(6) 'Can you tell us how many divisions there are?'

(7) 'Will you tell us whether or not each division of the Communist Party of Los Angeles County keeps books of the membership of that division?'

(8) 'Will you tell us the names of the chairmen or organizers of these divisions?'

(9) 'Will you tell us whether or not these divisions each have a membership or social director?'

(10) 'Mr. Greenfield, we want to know the names of these people that hold these offices!'

(11) 'Well, does each division have a financial director? If so, will you give us their names?' "[7]

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[7]R. 11 to 15, inclusive.

Also a similar presentment was returned against appellant Newman who refused to answer certain questions as follows:

"(1) 'Do you know Dorothy Healey?'

(2) 'Do you know her office address?'

(3) 'Do you know her business or occupation?'

(4) 'Now, what is your business address?'

(5) 'Who are you educational director for?'

(6) 'Do you know who the financial director is of the eastern division of the Los Angeles County Communist Party?'

(7) 'Do you know who the membership or social director is of the eastern division of the Los Angeles County Communist Party?'

(8) 'Now, who is the chairman of the Los Angeles County Communist Party?'

(9) 'Who is the organizational secretary of the Los Angeles County Communist Party?'

(10) 'Now, do you know whether or not the Los Angeles County Communist Party has a labor director?'

(10a) 'Do you know whether or not they have a membership or social director?'

(11) 'Do you know whether or not the membership or social director has a list of the membership of the Los Angeles County Communist Party?'

(12) 'Do you know whether or not the Los Angeles County Communist Party has a financial director?'

(13) 'Do you know whether or not the financial director keeps an account of the dues collected from the members of the Los Angeles County Communist Party?'

(14) 'Do you report to anybody who you see?'

(15) 'Do you know Dorothy Healey is the organizational secretary of the Communist Party of Los Angeles County?'

(16) 'Do you know whether Dorothy Healey has in her possesion or under her control any books and records of the Communist Party of Los Angeles County?' "[8]

The District Court, on its own motion, ordered these causes consolidated for trial, there being no objection to consolidation. The date set was June 23, 1949. All appellants were found guilty on June 28, 1949. Appelman was sentenced to serve one year imprisonment; Averbuck to pay a fine of $10.00; Greenfield one year imprisonment; Newman, one year imprisonment and Healey eighteen months [R. 28, 30 and 35 to 43, incl.].

The Questions Involved.

1. Whether the privilege against self-incrimination extends to collateral and auxiliary testimony concerning books and records of an unincorporated association, such as the Los Angeles Communist Party?

2. Whether a witness before a Federal Grand Jury may invoke the privilege to shield and protect third persons connected with the Party?

3. Whether or not a witness may refuse to testify before a grand jury wherein—

A. He would have received automatic immunity by operation of law had he testified?

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[8]R. 22 to 26, inclusive.

B. He was expressly offered complete immunity from any prosecution by the United States Attorney and the office of the Attorney General?

4. Whether a witness may refuse to testify in the absence of a real danger of self-incrimination, and upon his own speculation of a remote and imaginary danger—

A. Is not contempt of Court complete, upon refusal to answer one single question, which a witness is bound to answer?

5. Whether a witness may involve the privilege of silence merely because his answer might connect him with the Communist Party of Los Angeles?

A. Whether the Party is an illegal organization?

1. Whether membership therein is unlawful?

(a) Where a witness was never asked whether or not he is a member—can he refuse to to say whether or not he knows who are officers and members?

B. Whether the privilege is justified merely upon the opinion of the Attorney General that the Party is a subversive organization?

1. May a witness refuse to testify merely because of public statements of the United States Attorney?

C. Whether a prosecution under the Smith Act elsewhere in the United States against persons alleged to be Communists, is alone sufficient basis for the privilege of silence?

ARGUMENT.

Summary.

In the matter of the five appellant witnesses herein, there was a finding by the District Court that each and every one of them wilfully, deliberately and contumaciously obstructed the investigation of the grand jury by failing and refusing to answer the questions which were ruled to be proper and material in an inquiry pursuant to the loyalty program set in motion by a Presidential Executive Order. Each of the witnesses was told that he was not under investigation. Each of the witnesses was offered a broad and complete immunity by the United States Attorney and the Office of the Attorney General. Each of the witnesses, except Appelman, was offered an opportunity to be heard by the Court, privately in chambers, in order to explain how his privilege against self-incrimination would be violated by answering said questions. None of the witnesses availed themselves of that opportunity. Upon a hearing in open court, the witnesses were ordered to return to the grand jury and answer the questions. The Court found that there was neither a present nor real danger of self-incrimination by replying to the questions. Upon further refusal on the part of the witnesses based upon the privilege clause of the Fifth Amendment to the Constitution, the Court had another hearing and adjudged the appellants in contempt of court.

From that judgment these five witnesses have appealed. In substance, all of the questions are either auxiliary or collateral to the inquiry about the books and records of the Los Angeles Communist Party, except those put to Appelman, or deal with the identity of officers, or the nature of the organization of said party. In no case was

the witness asked whether he was a member of any Communist Party.

It is urged by the Government in this appeal that the issues raised be resolved against the appellants. First, it is urged that the privilege against self-incrimination does not extend to collateral and auxiliary testimony concerning the books and records of an unincorporated association, such as the Los Angeles Communist Party. Second, it is urged that a witness before a Federal grand jury may not invoke the privilege, which is personal to him alone, in order to shield and protect third parties who may or may not be connected with the Communist Party. Third, a witness may not refuse to testify before a grand jury wherein he would have received automatic immunity by operation of law had he testified, since under the decisions of the Supreme Court it is extremely doubtful that such testimony would be admissible. Further, it is inconceivable that once immunity has been offered by the Government that it would attempt to turn such evidence against any witness in breach of the good faith in which the assurance was given. Fourth, the appellants herein had no reasonable grounds upon which to claim the privilege of silence in the absence of a real and substantial danger of self-incrimination. They had no right to obstruct the investigation of the grand jury being conducted under the loyalty program based upon their own speculation of some remote and imaginary danger. By the failure to answer one single question which they were bound to answer, the judgment of contempt against every appellant should be sustained. It is submitted there is more than one question which each appellant witness should have answered.

Fifth, the appellants had no Constitutional right to assert the privilege merely because their answer might

connect them with the Communist Party of Los Angeles. Under existing Federal and State legislation and the prevailing rule announced by the Supreme Court, the Communist Party is not an illegal organization nor is membership therein unlawful *per se*. Furthermore, the prosecution of certain individuals elsewhere in the United States under the Smith Act, wherein the indictment alleged a conspiracy to overthrow the Government of the United States by force and violence, did not justify the privilege of silence herein although the defendants in that case were alleged to have organized the Communist Party. Furthermore, the opinion of the Attorney General and public statements of the United States Attorney in this district to the effect that the Communist Party generally was a subversive organization did not suffice to clothe them with the privilege since those statements did not have the force of law. Furthermore, guilt is personal and may not be imputed by association.

It is further submitted that a refusal to testify on the part of these appellants was neither justified in law nor in fact. Instead it was a subterfuge to protect others connected with the Communist Party, and in particular, those in the employ of the Government whom the grand jury had a right and duty to investigate. On the basis of National security, and in the face of world conditions as they are, the Government acting within its sovereignty, was justified in commencing this inquiry to ascertain the identity of disloyal persons. It is submitted that the District Court has been amply vindicated in evaluating the substance behind said inquiry and committed no error in finding these appellants in contempt. We now ask this Court to pierce the veil of subterfuge with which these appellants have clothed themselves thus far, and sustain these judgments.

POINT I.

An Officer of the Communist Party Has No Constitutional Right Under the Privilege Clause of the Fifth Amendment to Refuse to Testify Concerning the Books and Records of the Organization.

A. There Is Ample Proof in the Record That Dorothy Healey Was an Officer of the Los Angeles County Communist Party.

The privilege against self-incrimination is a purely personal one and it cannot be utilized by or on behalf of any organization, such as a corporation; *Wilson v. United States,* 221 U. S. 361; *United States v. Watson,* 266 Fed. 736; *Brown v. United States,* 276 U. S. 134 at 142. Nor may the privilege be invoked to shield or protect an association, *United States v. White* (1944), 322 U. S. 694 at 699.

In their official capacity officers of corporations or unincorporated associations have no privilege against self-incrimination. The official records and documents of the organization that are held by them in a representative rather than personal capacity cannot be the subject of the personal privilege, even though production of the papers might tend to incriminate them personally (*White* case, *supra*). The Court said, further:

> "Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." (At p. 700, *White* case.)

In the *White* case a subpoena *duces tecum* was issued by the United States District Court during a grand jury investigation of irregularities in the construction of a Naval Supply Depot in Pennsylvania directed to a labor

union. An officer appeared but declined to produce the records upon advice of counsel. He was found guilty of contempt of court. This conviction was upheld in the Supreme Court. It was held that the custodian of a labor union's records has no constitutional right under the Fifth Amendment—to refuse to produce such records at a grand jury investigation, based upon the ground of possible self-incrimination, citing *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652 and 8 Wigmore on Evidence, 3rd Ed., Sec. 2259a.

A slight distinction must be pointed out here in that the subpoena *duces tecum* in the *White* case was directed to the Union. In the present case it was directed to Healey as an individual, but this was not pressed after she denied both possession and control over the Communist Party Records. Nor was she cited for contempt for failure to obey the subpoena *duces tecum.* However, she was then asked a series of questions about those records, where they were, and who had possession or control. She refused to answer questions (2), (10), (11), (12), (28), (30), and (31),[1] of the presentment, which dealt with the books and records directly.

The Court held Healey in contempt only after ample evidence had been produced that she was an officer of the Los Angeles Communist Party, from which testimony the Court could have inferred she had all information necessary concerning the existence and whereabouts of said

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[1]R. 17, 18, 19 (Presentment) and R. 60 to 72.

records. Therefore, by analogy the *White* case and the present one contains a distinction without a difference.

As for the other appellants, a similar line of questions was directed to them concerning the books and records of the Los Angeles Communist Party, with the exception of Appelman. Averbuck refused to answer questions (3) and (9)[2] as set forth in the presentment; Greenfield refused to answer questions (1) and (3) of the presentment; Newman refused to answer questions (11), (13) and (16) of the presentment about the books and records.[3]

In *United States v. Bryan* and *United States v. Fleischman,* decided May 8, 1950, Nos. 98 and 99, as yet unreported except in Advance Sheets for Volume 339, No. 3, of Supreme Court reports, the convictions were upheld for wilful default before the Committee on Un-American affairs of the House of Representatives.

Bryan was executive secretary and had custody of the records of an association known as the Joint Anti-Fascist Refugee Committee. A subpoena was issued to Bryan to appear, testify and produce certain records of the association. She appeared, admitted she had said records but upon advice of counsel refused to produce them upon the ground that the Committee had no constitutional right to demand them, and raised the defense at her trial in United States District Court for the District of Columbia that the committee lacked a quorum.

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[2]R. 8 and 9 and R. 78-82.

[3]R. 24-25; R. 86 to 98.

The Supreme Court waived aside the lack of quorum argument and sustained the conviction of default obtained in the trial court for violation of R. S. Section 102, 2 U. S. C. Section 192.[4] The defaults in the *Bryan* and *Fleischman* cases were similar to the contempt in the *Healey* case—except that they were harder cases. Compliance with the subpoena to produce books and records in the *Bryan* case required point action of the Refugee Committee.

And the Court held that to excuse default in such a case, the witness must show a modicum of good faith in responding to subpoena. Further, that when one accepts an office of joint responsibility in which compliance with lawful orders requires joint action by the board or body of which he is a member, he necessarily assumes an individual responsibility to act within the limits of his power, to bring about compliance with the orders. The fact that such witness has no individual control over the records was no defense.

The Court held in the *Fleischman* case that the fact that the organization here involved was an unincorporated association, rather than a corporation (as in the *Wilson* case, *supra*) was immaterial.

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[4]" '11 Stat. 155, as amended, R. S. §102, 2 U. S. C. §192:

'Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.' "

It further held at page 364, that in the absence of evidence that the witness made some effort to bring about compliance with the subpoena, or had some excuse for failing to do so, the evidence adduced by the government amply sustained the conviction.

The Court had this further to say in the *Bryan* case:

"Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability, *cf.* Jurney v. MacCracken, *supra,* or is impeding justice by not explaining what happened to them, *United States v. Goldstein,* 105 F. 2d 150 (1939).

"On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See, *e. g., Blair v. United States,* 250 U. S. 273, 281 (1919); *Blackmer v. United States,* 284 U. S. 421, 438 (1932).

"Certain exemptions from the attending or, having attended, giving testimony are recognized by all courts. But every such exemption is grounded in

a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth. Dean Wigmore stated the proposition thus: 'For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'[5]

"Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed. Testimonial compulsion is an intensely practical matter. If, therefore, a witness seeks to excuse a default on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena. That such was the situation in this case does not admit of doubt. In the first place, if respondent had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that she state her reasons for noncompliance upon the return of the writ. * * *"

Of course, a limitation must be observed in these cases as to their application to the present *Healey* case.

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[5]Wigmore, Evidence (3d ed.), Section 2192.

A witness appearing before a Congressional Committee is given immunity by statute[6] from prosecution for testimony in any criminal proceeding, except for perjury.

However, we shall hereinafter show that Healey and the other appellants were given an automatic and effective immunity by operation of law. Also, the United States Attorney and the Special Assistant to the Attorney General expressly *offered each appellant witness* immunity as broad and complete as that given by any statute.[7]

In *Brown v. United States* (1928), 276 U. S. 134, a subpoena *duces tecum* had been served upon the witness personally to produce the books and records of an unincorporated association before the grand jury. This was an inquiry into alleged violation of the Sherman Act. He refused and upon presentment to the District Court, he urged the subpoena would result in unlawful seizure and *production of evidence against himself.* The Court found his claim of privilege to be without merit and ordered him to appear before the grand jury and produce the documents called for. He again refused and was held in contempt and sentenced to imprisonment.

In affirming the judgment the Supreme Court said on page 144:

> "In any event it was Brown's duty to produce the papers in order that the court might by an inspec-

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[6]"No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege." 18 U. S. C. 3486.

[7]See page 354 of Record in *Healey* case, No. 12283.

> tion of them satisfy itself whether they contained matters that might incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena."

The Court further pointed out on page 145 that:

> "The individual citizen may not resolve himself into a court and himself determine and assert the incriminating nature of the contents of books and records required to be produced,"

citing *Commonwealth v. Southern Express Co.,* 160 Ky. 1, 3—also *Ex parte Irvine,* 74 Fed. 954, 960; *United States v. Collins,* 145 Fed. 709, 712; *Mitchells* case. 12 Alb. Pr. 249, 260-261. And see generally, *Blair v. United States,* 250 U. S. 273, 282.

To restate one of the paramount issues of this case which may distinguish it from the *Kasinowitz* and the other allied cases in connection with this series, we have the question of whether or not a person called before the grand jury may refuse to testify concerning books or records of an unincorporated association, such as the Communist Party of Los Angeles. As set forth in the statement of the facts and the grand jury presentment referred therein as to questions which these appellants refused to answer, we find several in each case except Appelman that dealt with the custody, location and nature of the records and documents kept by that organization. It is urged herein that none of these appellants had a right under the Constitution or the laws of the United States to refuse to answer these questions. In support of this premise, numerous cases have been cited and the cases are legion in addition to those cited herein in support

of this position. Not only does a witness have no right to refuse to produce the books and records of a corporation, an unincorporated association or a labor union, but he has no privilege under the decisions in refusing *to testify about them collaterally.* Furthermore, it makes no difference whether the subpoena *duces tecum* was issued to them as an officer of the organization or whether it was issued to them as an individual. The rule is stated in our circuit in the case of *United States v. Lumber Products Association* (1942) in the District Court of the Northern Division of California, 42 Fed. Supp. 910 at page 916 as follows:

> "Testimony identifying the documents and auxiliary to the production of them is as unprivileged as are the documents themselves. United States v. Austin-Bagley Corp., 2 Cir., 31 F. 2d 229; United States v. Illinois Alcohol Co., 2 Cir., 45 F. 2d 145, 149, certiorari denied 282 U. S. 901, 51 S. Ct. 214, 75 L. Ed. 794."

That case was affirmed on appeal to this Court in 1944. See 144 F. 2d 546 and in particular at page 553, wherein Honorable Judge William Denman wrote the opinion for the Court and restated the rule of law as follows:

> "The transcript of their testimony given before the grand jury is included within the record now before us. Ryan v. United States, 9 Cir., 128 F. 2d 551, 552. It shows that each identified the organizational records produced; that each was an officer or agent of his respective union, and that each outlined the organizational structure and relationships between the several unions. *None of such testimony is within*

the area of immunity. United States v. Greater New York Live Poultry C. of C., D. C. N. Y., 34 F. 2d 967, certiorari denied, 283 U. S. 837, 51 S. Ct. 486, 75 L. Ed. 1448."

That case went to the Supreme Court and was reported in 330 U. S. 395, decided 1947, wherein this case was consolidated with a group of related cases. It was reversed on other grounds wherein the Court discussed at some length the conspiracy to violate the Sherman Anti-Trust Act on the part of the various defendants. The precise rule of law which we are urging here was apparently never considered or passed on by the Supreme Court in its opinion.

In the *Austin-Bagley Association* case cited by the District Judge and in the *Lumber Products Company* case (*supra*), 31 F. 2d 229 (1929), Circuit Judge Learned Hand at page 233 stated the law as follows:

> "That the production of the books and documents could be compelled, even if they contained entries incriminating the accused, is now well-settled law. Wilson v. U. S., 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Wheeler v. U. S., 226 U. S. 478, 33 S. Ct. 158, 57 L. Ed. 309; Grant v. U. S., 227 U. S. 74, 33 S. Ct. 190, 57 L. Ed. 423. Though they be in their very possession, even their property, it makes no difference; it is the semipublic character of the documents themselves which removes their inviolability, the fact that they record corporate transactions."

Further on at page 234 that Court refers to the case of *Heicke v. United States*, 227 U. S. 131, and says that:

> "Unless that case is to be disposed of on the theory that no such immunity was claimed, it necessarily

held that the privilege did not exist. Hence it appears to us that the case determines *that testimony auxiliary to the production is as unprivileged as are the documents themselves.* [Emphasis ours.] By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own. All questions of immunity and the supposed misconduct of the district attorney in repeatedly demanding the documents in the jury's presence fall with the privilege. For this at any rate Heike v. U. S. is direct authority; 'we see no reason for supposing that the act offered a gratuity to crime' (page 142 (33 S. Ct. 228))."

See also *United States v. Illinois Alcohol Co.,* 2nd Circuit (1930), 45 F. 2d 145 at page 149, wherein the rule was stated again as follows:

"A person producing corporate books and records before a grand jury and giving testimony as to such production is not entitled to immunity under this section. Any testimony auxiliary to such production is unprivileged as are the documents themselves. Wilson v. United States, 221 U. S. 361, 384, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, Dreier v. United States, 221 U. S. 394, 31 S. Ct. 550, 55 L. Ed. 784; U. S. v. Austin-Bagley Corp., *supra*;"

In the *Dreier* case cited above, the Supreme Court follows the *Wilson* case, *supra,* to the effect that an officer of a corporation cannot refuse to produce books and papers of the corporation in response to a subpoena *duces tecum* on the ground that the contents thereof would tend to incriminate him personally.

In the *Lumber Products Company* case, this Court cited the *New York Poultry Company* case, 34 F. 2d 967.

That case held that a witness subpoenaed to testify before the grand jury as to the books and records of a labor union of which he is an officer may be questioned in detail concerning said records, notwithstanding his claim of immunity from criminal prosecution by reason of so testifying. On page 968 of the opinion, the Court recited that the evidence discloses that the inquiry made by the District Attorney in charge of the grand jury investigation involved the question of books and records of Local 167 of which the defendant was an officer and secretary-treasurer at the time he appeared before the grand jury. He appeared in response to a subpoena *duces tecum* to present the books and records of that association. He failed to do so. Concerning this the Court said:

> "This it would seem was a duty imposed upon the defendant which he could not evade under the rule in Heike v. United States, 227 U. S. 131, 33 S. Ct. 226, 57 L. Ed. 450, and other cases. *Neither do I believe that because the same subpoena was of a personal nature to the defendant should exempt him from giving testimony concerning the books, papers, and documents of the association of which he was an official.*" (Emphasis ours.)

On the matter of testimony before an administrative board wherein the investigation of books and records and activity of a corporation was being conducted, the case of *Consolidated Mines of California v. Security Exchange Commission* (Ninth Circuit), 97 F. 2d 704, 707, was cited with approval by the Fifth Circuit in *Zinser v. Federal Petroleum Board* (1945), 148 F. 2d 993. In the latter case the witness refused to answer questions before the Federal Petroleum Board investigating a matter under the Conally-Hot Oil Act. The board guaranteed immunity in event any answers would in any way

incriminate him. The witness still declined. The Court held, after considering each and every question propounded, that the Court below committed no reversible error in directing the witness to answer such questions.

POINT II.

The Privilege Against Self-Incrimination May Not Be Asserted on Behalf of Third Persons.

(1) The privilege clause of the Fifth Amendment was never intended as a cloak or a shield to protect other persons.

The Courts have held again and again that the Bill of Rights was added to the Constitution as a protection of individual liberty. The Fifth Amendment in particular established a personal right that may be asserted by and for an individual alone. It is a right that may not be assigned or delegated. It is vested as a life estate in each person whether a citizen of the United States or not. Therefore, it need not be and may not be asserted for or on behalf of any other person. As we have seen already, the privilege may not be claimed by a corporation (*Wilson* case, *supra*) nor by an unincorporated association (the *Bryan* and *Fleischman* cases, *supra*) nor by or on behalf of a labor union, *U. S. v. White,* 322 U. S. 694 (1944) at pages 701 and 704, because the union did not itself possess such a privilege.

The Court said at page 704:

> "Moreover, the privilege is personal to the individual called as a witness, making it impossible for him to set up the privilege of a third person as an excuse for refusal to answer or to produce documents."

Further at page 704, it said:

> "The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. *No valid claim was made that any part of them constituted his own private papers.* (Emphasis ours.) He thus could not object that the union's books and records might incriminate him as as officer or as an individual."

It is submitted, therefore, that no political party possesses the privilege under the Fifth Amendment. It follows that no officer or member of such party may assert the privilege and rely upon it to escape contempt of Court.

It is further submitted that the District Court committed no error in finding Healey and the other appellants in this case guilty of contempt under the facts and circumstances contained in the record. Does it not boil down to the proposition that these appellants were not seeking to protect themselves so much as to shield other members as well as the Los Angeles Communist Party Organization. If we penetrate the veil of their subterfuge, was not their refusal to testify a convenient evasion of their duty to tell what they knew about the Party? Not only were they trifling with the powers of the grand jury to investigate, were they not obstructing the Government in the exercise of its undisputed sovereignty to ferret out the Hisses and the Fuchs in its employment who might betray secrets upon which their security depends?

In *Loubriel v. United States,* Second Circuit, 1926, 9 F. 2d 807 (cited with approval by the Supreme Court in the *Bryan* case, *supra*) Judge Learned Hand wrote as follows:

> "The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance. We have not the least doubt of the power of the District Court to punish a witness for evasion patently put forward to avoid his duty. No doubt, since its exercise is drastic, it is to be used with caution, but at times no other means exists to prevent an entire miscarriage of justice."

In that case Loubriel, the appellant was summoned before a New York grand jury upon subpoena and questioned about the disposition of certain alcohol. He was employed by one D who was a perfume dealer. The theory of the investigation was that he was disposing of D's products to persons for conversion into intoxicating beverages. Although he had traded with his customers 25 years, he claimed he did not know their names. The grand jury certified him to the Court for obstructing their investigation, and he was committed for contempt.[1]

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[1]The *Loubriel* case differs from the present one in that it was for civil contempt, and he was ordered discharged as the grand jury term expired. The Court said on p. 809, if he was to be punished, his punishment must be fixed (as in criminal contempt); if he were to be coerced, it might be only while the inquiry was on.

There was a case of patent evasion of duty to testify fully and truthfully, held to be contempt of court for the appellant was obviously protecting third parties, namely his customers. Here, by analogy Healey and the other appellants have used the device of privilege, not as the Constitution intended, but merely to throw a smoke-screen about their Communist fellow travellers, so that they might escape, especially those who may have been employed by some Government agency.

The Supreme Court in *Brown v. Walker,* 161 U. S. 591 (1896) reviewed the history of the privilege against self-incrimination. In that case the witness was called before the Interstate Commerce Commission under a subpoena to produce books, papers and documents. He refused on the ground that the production of said papers might tend to incriminate him. The statute provided that "No person shall be excused from attending and testifying or producing documents before the Commission but that no person shall be prosecuted on account of any matter concerning which he may testify or produce evidence in obedience to the subpoena." The Court held that the latter provision of the statute affords absolute immunity against prosecution, Federal or State, and deprived the witness of his Constitutional right to refuse to answer. After reviewing the evolution of the rule from the time it developed in England down through the Constitutional enactment in the American system, the Court had this further to say:

> "Stringent as the general rule is, however, certain classes of cases have always been treated as not fall-

ing within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else—much less that it shall be made use of as a pretext for securing immunity to others." * * *

"The danger of extending the principle announced in *Counselman v. Hitchcock*[2] is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

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[2]142 U. S. 547.

POINT III.

Appellants Would Have Obtained Automatic Immunity by Operation of Law, Had They Testified.

A. Any Testimony a Witness Is Compelled to Give Before a Grand Jury by Order of Court, Would Not Be Admissible Against Him in Any Criminal Proceeding, Except Perjury.

1. Any Criminal Proceeding Means—a Proceeding Arising Out of Past Offenses, in Relation to the Time of Inquiry.

Under the doctrine of *McNabb v. United States,* 318 U. S. 332, any evidence against appellants thus obtained would be inadmissible in a criminal prosecution in any Federal Court. Any conviction had resting upon such evidence, that is involuntary, or coerced, would have to be set aside. The Court in that case said on page 340 that it has set aside convictions in both State and Federal Courts based upon confessions secured by "unconstitutional methods." However, in Federal criminal trials, the rules of evidence are not restricted to those derived solely from the Constitution. The Supreme Court exercises supervision and authority over the administration of criminal justice in the Federal Courts (see page 341 of opinion) and it is inconceivable that it would allow any conviction to stand based in whole or in part on admission or testimony given before a grand jury, as against these appellants.

The case of *Anderson v. United States,* 318 U. S. 350, decided at the same time as the *McNabb* case—rests upon the same principles and considerations. In both cases the decision turned mainly on failure to take the defendants before a magistrate with delay by arresting

officers as required by United States statutes.[1] Instead confessions were obtained after long periods of detention and questioning before the taking of prisoners before a committing authority. Similar legislation appears in the statute books of nearly all the states.[2]

The fundamental rule of Evidence that any confession or admission must be voluntary before it is admissible in Court, is too well founded to require citation of authority, but see Wigmore, Volume III, Section 826, page 255, also Section 823, pages 248 and 249, and Section 2550, Volume IX, page 501.

Furthermore, should the United States Court of Appeals for this Circuit support the findings of the Trial Court, that appellants had no reasonable grounds to claim the privilege of silence, it is submitted that anything they did say under such circumstances, could never be used against them.

As it was stated in the beginning to each witness by the United States Attorney or the Special Assistant to the Attorney General, the object and purpose of the grand jury inquiry was to find out whether or not certain Government employees had made false statements.[3] Also, each witness was told expressly that he was not under investigation. It follows then that the Government in good faith was foreclosed to ever use any information

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[1]18 U. S. C. 595 then in effect. Repealed effective September 1, 1948; now covered—by Rule 5, Criminal Rules Federal Procedure.

[2]California Penal Code 1949, Sections 821-29, 847-49. See also footnote page 342 of *McNabb* opinion for reference as to other states.

[3]Loyalty Program pursuant to Executive Order of President, No. 9835, 12 Federal Register 1935, dated 1947. See Stanford Law Review, Volume 1, No. 1, November 1948, pages 88, 89.

obtained from these witnesses against them. It would be a cruel joke indeed if our Government, and in particular if the Department of Justice called a witness and gave him the above assurances, then turned around and used that information to prosecute him. Our Government does not do business that way. If these appellants or any of their friends hold a mental reservation of allegiance to some other Government that does operate that way, they have no reasonable ground to expect that kind of treatment in this country. It is believed that the District Court must have considered these assurances by the Government, among other circumstances, in holding that the direct answers to the questions asked of each witness could not possibly affect him in "any criminal proceeding."

The latter term was defined and explained in the *Bryan* case (*supra*) on pages 340 and 342 by the Supreme Court in its construction of Section 3486 of Title 18, U. S. C., as follows:

> "The debates attending enactment of the statutes here in question and the decisions of this and other federal courts construing substantially identical statutes make plain the fact that Congress intended the immunity therein provided to apply only to past criminal acts concerning which the witness should be called to testify." * * *
>
> "* * * There is, in our jurisprudence, no doctrine of 'anticipatory contempt.' While the witness' testimony may show that he has elected to perjure himself or commit contempt, he does not thereby admit his guilt of some past crime about which he has been summoned for questioning but commits the criminal act then and there.

"In *Glickstein v. United States, supra,* this Court considered the problem thereby presented. It was there held that perjury committed in the course of testimony given pursuant to statute falls outside the purview of §7 (9) of the Bankruptcy Act, 11 U.S.C. § 25 (10), which, like R. S. § 859, provides that no testimony given by the witness (at a creditors' meeting) shall be used against him in any criminal proceedings. In the Court's view, such an immunity 'relates to the past and does not endow the person who testifies with a license to commit perjury.' 222 U. S. at 142. The distinction is fully spelled out in a Circuit Court of Appeals opinion, *Edelstein v. United States,* 149 F. 636 (1906), which was cited with approval in the *Glickstein* case:"

"* * * The words, 'any criminal proceeding' cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify." 149 Fed. at 643-644.

It is submitted that the same construction should and would be given by that Court as to the meaning of the phrase "in any criminal proceeding" as used in the Fifth Amendment.

Therefore, it is urged herein that the same kind of effective immunity existed on behalf of these appellants in this case as prevailed under the statute that protects witnesses who appear before Congress, or any committee thereof. As a practical matter, nothing they might have said could ever be used against them in a trial arising out of any past criminal activities, if there were such. Since

the grand jury investigation is a secret inquiry, it is difficult to see how their testimony could ever be available for use before State or Municipal Courts. However, it is not contended that appellants were given a license to commit perjury by testifying falsely before the grand jury—any more than before a Congressional Committee. Neither did they have a right to obstruct the grand jury investigation by refusing to state, if they knew, which books and records were kept by the Los Angeles Communist Party. Nor did they have a right to refuse to admit or deny they knew who the various captains and lieutenants of the local party were.

It is not controverted herein that the grand jury was duly constituted or that it had a right and duty to make this investigation. Early motions in the case, however, throw considerable doubt on the sincerity and good faith of appellants in urging the privilege of silence now.

In the beginning the witnesses in all these cases took the position, first, that the grand jury was not conducting a bona fide investigation within the scope of its powers. They urged that the Attorney General instituted the inquiry solely to advance the political interests and fortunes of those whose tenure of office depended upon the political campaign for the presidency of the United States at that time.[4]

Secondly, they urged that the witnesses were subpoenaed by the Attorney General and his assistants not for the purpose of conducting a bona fide grand jury investigation, but for the purpose of harassing certain individuals believed to be members of the Communist Party. These attacks were made before the witnesses

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[4]Kasinowitz Record, Volume 1, page 63.

appeared before the grand jury upon a motion to quash the subpoenas, and before said witnesses could have known the word "Communist" had been used in any way by counsel for the Government, or before the grand jury.[5]

Thirdly, the appellants attacked the composition of the grand jury and urged that it was improperly selected and that there were material departures from the form prescribed by law in the matter of the selection of the grand jury. They urged that it was not an impartial grand jury drawn from a cross-section of the community in that certain groups of the community were excluded, namely, the laborers and domestic workers who were thus discriminated against, but that it was drawn from property owners, managers and officials of the so-called upper or middle class strata of society.[6, 7]

In *Blair v. United States* (1919), 250 U. S. 273 Supp. 281 and 282, the Supreme Court answers these contentions for all time by saying:

> * * * "It is clearly recognized that the giving of testimony and attendance upon the court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned. * * * The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. * * * The duty so

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[5]Kasinowitz Record, Volume 1, page 64.

[6]Kasinowitz Record, Volume, pages 62, 63. See also Volume 4 of same record, page 20.

[7]See page 6 of appellants' brief in the present case of *Healey, et al.*, No. 12283, wherein it is shown that the Court below ordered the entire record in all of these cases be incorporated in and deemed a part of the record in this case.

onerous at times, yet so necessary to the administration of justice * * * is subject to mitigation in exceptional circumstances; there is a Constitutional exemption from being compelled in any criminal case to be a witness against one's self, entitling the witness to be excused from answering anything that will tend to incriminate him (See Brown v. Walker, 161 U. S. 591) * * *. But aside from exceptions * * * the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry. * * * He is not entitled to urge questions of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. (Nelson v. U. S., 201 U. S. 92, 115.)

"On familiar principles he is not entitled to challenge the authority of the court or the grand jury provided they have a *de facto* existence or organization. * * *

"And for the same reasons witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject matter under investigation. In truth it is in the ordinary case, no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction."

The *Blair* case appears to be one of the great cases on the function of the grand jury and the compulsion of witnesses as an incident of the judicial power of the United States. The historical background of the process should make the case required reading in every law school. From it we may conclude that appellants have no standing to question the object and purpose of the grand jury investigation.

The Court said further on page 282:

> "That a witness is not entitled to set limits to the investigation that a grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers of the British prototype. * * * It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of *propriety* and *forecasts* (emphasis ours) of the probable result of the investigation or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Hendricks v. United States,* 223 U. S. 178, 184.

B. The Appellants Herein Were Expressly Offered a Broad and Complete Immunity From Any Prosecution Arising Out of Their Testimony Herein by the United States Attorney and the Special Assistant to the Attorney General.

The record in this case discloses that the United States Attorney and the Special Assistant to the Attorney General offered these witnesses a broad and complete immunity from any prosecution whatsoever that might arise from their testimony in this case. On page 354 of the printed record in the *Healey* case, we have the following statements extracted from the record:

> "The Court: I have pending before me these criminal informations. I take it that your offer of immunity now means that in the event that the witness—is that made to each one of these witnesses?
>
> Mr. Carter: It is made to each witness and in substance the offer is this: If there has been any misunderstanding on the part of the witness and the witness signifies his intention of appearing before the grand jury and answering these questions based upon the offer of immunity, the United States Attorney would move this court, subject to the court's approval, to terminate these proceedings on contempt.
>
> The Court: To dismiss them?
>
> Mr. Carter: To dismiss the contempt, so we will have the record clear as to what our intention was.
> * * *
>
> The Court: I think that is about as broad as any statement of immunity can be made, if that is your point, that it (106) is not broad enough.
>
> Mr. Margolis: That is one point, your Honor, and I want to state again, if your Honor will look at the Counselman case and the Brown case once

more, your Honor will find that the immunity must be against prosecution concerning the subject matter of the testimony, not as the result of anything which the testimony will lead to.

The Court: I do not see how he could have said it any clearer.

Mr. Margolis: What he could have said is, that you are going to be asked to testify concerning the subject, that you cannot be prosecuted with respect to the subject concerning which you testify. You simply cannot be prosecuted with respect to that subject, and the immunity we ask has to be so broad that even if they obtain the lead from some other place, other than this defendant, there can be no prosecution. That is what the cases hold, and some of the earlier statutes which didn't go that far were held to be insufficient.

However, whether or not your Honor holds—

Mr. Goldschein: May I interupt just a moment, please, sir?

May it please the court, so that the court will understand exactly what it was intended to do, that was the exact intent and purpose of the offer, that the witness would not be prosecuted. (107.)

The Court: I understand the language. It seems to me that it is as broad as it could be made."

Thus far we have considered the Government's theory that the appellants would have obtained automatic immunity by operation of law had they testified under the Court's compulsion. The Court found that the answers to the direct questions could not have incriminated them. The Court so found in view of all of the circumstances and it has been urged that had they so testified, none of that testimony could have been used against them in any

criminal proceeding. A second phase of the immunity has been set forth above in the extracts from the record. Therein direct immunity was offered by the Government in the broadest and most complete way possible. In support of that immunity, the Court of Appeals for the Third Circuit in *United States v. Levy* (1946), 153 F. 2d 995, had this to pay on page 997:

> "(3-5) Since ancient times government officials have been granting accomplices immunity from prosecution in return for testimony as to criminal transactions. In the United States the courts have held that only an equitable right to immunity exists unless a statute expressly authorizes a grant of immunity in the particular situation. Whiskey Cases, 1878, 99 U. S. 594, 25 L. Ed. 399; Mattes v. United States, 3 Cir., 1935, 79 F. 2d 127; United States v. Weinberg, 2 Cir., 1933, 65 F. 2d 394; Sherwin v. United States, 5 Cir., 1924, 297 F. 704. Indirectly, the cases establish the right of a government to grant immunity in the absence of specific statutory authority therefor. We hold that the admission of the testimony of the three witnesses who were promised immunity was not error."

The position of the United States Attorney, his duties and obligations not only to the Government but to defendants generally was set forth in a classic exposition by the Supreme Court in *Berger v. United States* (1935), 295 U. S. 78 at page 88 as follows:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that

justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."

POINT IV.

Appellants Had No Reasonable Grounds to Claim Privilege of Silence Concerning the Los Angeles Communist Party Organization or Its Officials.

The basic rule or principle of Law by which the privilege of silence has been measured and tested for almost one hundred years was laid down in the English case of *Regina v. Boyes,* 1 B & S 311, 321. There Cockburn, C. J., said to entitle the witness to the privilege of silence, the Court must see from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Further, the danger must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things; not a danger of imaginary and unsubstantial character having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

While the object of the law is to afford a witness protection against being penalized by his own evidence, yet it would be an abuse of such protection to hold that a merely remote, imaginary and naked possibility of danger, was sufficient to justify the withholding of evidence essential to the ends of Justice.[1]

The witness may not decide for himself when and if the privilege may be invoked and thus set himself up as the sole and exclusive judge of alleged danger. When the privilege is asserted, it must be assessed, and the exemption from testifying presupposes a very real interest to be protected,[2] and it was said by Chief Justice Marshall in Burr's trial in 1807,[3] Robertson's Rep. I, 243, that:

> "* * * there is no distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. . . . When two principles come in conflict with each other, the Court must give them both a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable

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[1]See Wigmore, Volume VIII, page 405.

[2]*Bryan* case, page 332, *supra.*

[3]See Wigmore, Volume VIII, page 405.

extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which, it is conceived, Courts have generally observed; it is this: When a question is propounded, it belongs to the Court to consider and decide whether any direct answer to it can implicate the witness; if this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law."

See also *Brown v. Walker* (1896), 161 U. S. 591 at 597 and *Blair v. United States* (1919), 250 U. S. 273 at 281, also *Mason v. United States* (1917), 244 U. S. 362 for restatement and application of the general rule laid down in these early landmark cases.

In the *Mason* case, the grand jury was investigating a change of gambling at Nome, Alaska, against six men other than the witness. Mason refused to answer two questions claiming that it might tend to incriminate him, namely, (1) was there a game of cards being played at the table where you were sitting?; and (2) was there a game of cards being played at another table at this time?

The foreman of the grand jury reported the facts to the Judge who heard the witness and held the questions would not tend to incriminate the witness, then directed him to return to the grand jury and make reply.

After appearing there, Mason again refused to answer the first question, the second he said: "I don't know." A second presentment followed, a hearing, and the witness was held in contempt.

The Supreme Court affirmed the District Court after reviewing both the trial of Aaron Burr, *In re Willie*, 25 Fed. Cas. No. 14692e, pages 38, 39, and the doctrine of Chief Justice Marshall referred to herein alone. Mr.

Justice McReynolds, in this opinion for the Court discusses the case of *The Queen v. Boyes* (1861), 1 B & S 311, 329, 330, in which Cockburn, C. J., laid down the classic rule of privilege against self-incrimination. He concluded that the Constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law" and cited *Brown v. Walker,* 161 U. S. 591, 599, and 600.

The Court had this further to say:

> "The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fortified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.
>
> "In the present case the witnesses certainly were not relieved from answering merely because they declared that so to do might incriminate them. The wisdom of the rule in this regard is well illustrated by the enforced answer, 'I don't know,' given by Mason to the second question, after he had refused to reply under a claim of constitutional privilege.
>
> "No suggestion is made that it is criminal in Alaska to sit at a tabel when cards are being played

or to join in such game unless played for something of value. The relevant statutory provision in §2032, Compiled Laws of Alaska, 1913, copied in the margin. (Sec. 2032.)

"The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded and, in the circumstances disclosed, we cannot say he reached an erroneous conclusion."

The *Mason* case stands for three propositions at least: First, that refusal to answer one single question that a witness is bound to answer may constitute contempt of Court; he need not refuse a dozen or so. Second, that the Trial Court being in the best possible position to evaluate the danger of self-incrimination on the part of a witness should be sustained unless there is a gross abuse of his discretion. Thirdly, yes or no answers to questions that would disclose association with others under inquiry are not sufficient to create a real danger, but it was so remote and speculative a possibility as to foreclose the privilege of silence.

The *Mason* case was cited by the Court of Appeals for the Second Circuit in *O'Connell v. United States,* 40 F. 2d 201 at 204. There a witness refused to answer questions before the Federal grand jury investigating the Albany baseball pool. He was asked: (1) Do you know, a place in Albany, called Malloy's?; (2) Is Malloy's at the corner of Van Zant and Hamilton Streets, Albany?; (3) Do you know a man by the name of Malloy? He refused to answer on the ground of self-incrimination.

The Court observed on page 204 that "many of the questions were merely whether he was acquainted with certain persons. A yes or no answer to such questions could have no direct tendency to incriminate him. The danger was much more remote than in *Mason v. United States, supra.*"

The close parallel between the case of appellants herein and the two above cases becomes apparent now. The District Judge ruled again and again in these cases that it is no crime to know somebody.[4] Appellants other than Healey were asked. Do you know Dorothy Healey—, her business address, her occupation, who the chairman of the Los Angeles Communist Party is—or its various directors? Healey was asked whether the Party had a chairman, who its directors are in addition to inquiry about books and records. Obviously most of the questions call for yes or no answers. The appellants did not reply they didn't know as Mason did to his second question. It is submitted that the District Court committed no error in ordering the appellants to answer one or more of these questions before the grand jury. Their refusal to do so, therefore, not resting on any reasonable basis in law or fact, constituted a clear case of contempt.

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[4]Page 276, Volume II, of printed record in *Kasinowitz* case says:

"The Court: A further ground and basis for my ruling is that it is immaterial whether Dorothy Healy is secretary of the Communist Party or is the Communist Party. As I have heretofore ruled, that is no crime, to know anybody."

POINT V.

The District Court Committed No Error in Ordering Appellants to Answer the Questions Before the Grand Jury.

A. Appellants Were Not Entitled to Assert the Privilege of Self-Incrimination on the Possibility That Answers to the Questions Might Connect Them With the Communist Party.

1. The Communist Party as such is not an illegal organization.
2. Neither the Smith Act nor any other law of the United States outlaws the Communist Party.
   (a) Membership therein is not unlawful.
3. The claim of privilege was not justified by any statements by the Attorney General or the United States Attorney, not having the force of law.
4. The prosecution of certain individuals elsewhere under the Smith Act, or other laws of the United States, was not adequate basis for the privilege.

The Communist Party as such is not an illegal organization, the conclusions of counsel for the appellants on page 323 of the printed record in the present case (No. 12283) to the contrary notwithstanding. At that page counsel was referring to the defendants' Exhibit "A" which was marked for identification at page 321 and apparently was not received in evidence as the record seems to indicate that the Court could take judicial notice of the contents therein. Defendants' Exhibit "A" dealt with 100 questions and answers prepared by the Committee on un-American Activities in the United States House of Representatives. It was the conclusion of counsel that this document indicated that the Communist Party is an

illegal organization in the opinion of a Government agency.

Further reference is made by appellants' counsel concerning defendants' Exhibit "B" admitted in evidence at page 344 of same record. Although this document purports to be a report of the Department of Justice in the field of internal security, it was dated June 15, 1949, long after the appellants refused to answer the questions before the grand jury. This was admitted into evidence over Government's objection. It would appear to be an error of Court in favor of the appellants, if any error was committed. It was urged by the Government that said appellants could not have been influenced in their refusal to testify at the time they did refuse, based upon the contents of this document. In the beginning, it refers to the policy of the Department of Jusice to the effect that the Communist Party is a subversive organization. Although it has been urged by the Government at all times herein that the inquiry of the grand jury was instituted pursuant to the loyalty paragraph pursuant to Executive Order No. 9835 at Volume 12, Federal Register, page 1935, dated March 25, 1947,[1] yet it is contended by appellants herein that the purpose and objectives of the grand jury investigation was to prosecute the Communist Party and its members generally throughout the United States. The record further contains references to public statements of the United States Attorney on the subject of Communism generally and attempts, by its members, to carry on subversive activity while hiding behind the bulwark of the Constitution and its guarantees.[2]

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[1]See Appendix A for Executive Order No. 9835.

[2]Pages 166-167, Record, *Healey* case.

Notwithstanding the contention of appellants herein, the position that the Communist Party as such is an illegal organization is untenable, granting for the purpose of argument that the Department of Justice has reported this group as being subversive. However, the Attorney General and the various United States Attorneys over the United States are entitled to no greater force of opinion than attorneys for defendants that appear in Court.

Therefore, the opinions of the Attorney General and/or the United States Attorney do not have the force of law, but are merely statements of policy or the view of the Government at the time on a particular problem.

Our attention has been directed by the appellants to the prosecution of certain alleged Communists in New York under the Smith Act. Record reference to this prosecution may be found at page 344 of said record also contained in defendants' Exhibit "B". They urge that this particular trial alone is sufficient basis upon which the appellants may assert their privilege of self-incrimination in the grand jury proceeding herein. However, in that case, namely, *United States v. William Foster, et al.*, 9 F. R. D. 365, also found in 83 Fed. Supp. 197, D. C. N. Y.,[3] we find the law given to the jury as follows:

> "(32) Request No. 38. I charge you that you cannot find any defendant in this case guilty of the crime charged against him merely from the fact, if you find it to be a fact, that he *associated* with any other defendant or defendants whom you may find guilty of the offense charged.

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[3]*Foster, et al. v. U. S.* now affirmed by U. S. Court of Appeals for Second Circuit ( ) F. 2d ( ), August 1950.

"(33) Request No. 39. I charge you that under our system of law, guilt is purely personal and that you may not find any of the defendants guilty *merely by reason of the fact that he is a member of the Communist Party of the United States of America* (emphasis ours). no matter what you find were the principles and doctrines which were taught or advocated by that Party during the period defined in the indictment. * * *

"(37) Request No. 275. I charge you that the statute under which the defendants were indicted does not prohibit the teaching or advocacy of peaceful change in our social, economic or political institutions, no matter how fundamental or far-reaching or drastic such proposals may be."

It must be observed that these instructions were submitted on behalf of the defendants, and the Court ruled them to be proper by instructing the jury on the law of that case. In addition to the above, the Court instructed, on page 393, that it was not enough for the prosecution to show the existence of an agreement and the membership therein of any particular defendant. This alone did not prove that the defendant participated in the agreement knowingly and wilfully. The jury was further instructed that if they were not convinced beyond a reasonable doubt that such defendant acted wilfully, the verdict must be not guilty. Instruction was given on the word "revolution" to the effect that in its broadest significance it is used to designate a sweeping change as applied to a political change that it denotes a change in a system of Government, and though it is frequently accompanied by violent acts, it need not be violent in its methods. It does not necessarily denote force or violence. The prosecution in the *Foster* case was based

primarily on the Smith Act which makes it unlawful for any group to organize or conspire to urge the overthrow of the Government in the United States by force and violence, or to become a member of or affiliate with such society or group of persons knowing the purposes thereof.[4] The Smith Act now appears in 18 U. S. Code, Section 2385.

In that trial, it was incumbent upon the Government to prove beyond a reasonable doubt that the particular defendants involved had conspired or organized, agreed or associated themselves together for the purpose of advocating and overthrowing the Government of the United States by force and violence. The essence of the trial was not to prove the defendants were members of the Communist Party though it may have been alleged in the indictment that they organized the Communist Party. It is submitted that Judge Harold R. Medina, who attained considerable national stature as a trial judge,[5] in this case stated the law correctly when he instructed that "you may not find any of the defendants guilty merely by reason of the fact that he is a member of the Communist Party." It is submitted that if it were proven beyond a reasonable doubt that one or more persons conspired and agreed to overthrow the Government of the United States by force, it would not matter whether they were members of the Republican, Democratic or Communist Party, or for that matter, were simply members of a labor union or an extraneous organization in the United States. In Defendants' Exhibit "B" it is stated on page 352 of the record

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[4]See Appendix B for pertinent parts of Smith Act.

[5]See Saturday Evening Post for August 12, 1950, page 17, "The Ordeal of Judge Medina," by Jack Alexander.

that the Attorney General, after an exhaustive and thorough investigation, has listed a total of 159 organizations in the United States as hostile and inimical to our Government and our way of life.

In the *Foster* case, *supra,* Judge Medina gave an instruction at the request of the prosecution on the *Schneiderman* case at page 394 as follows:

> "Request No. 34. During the course of the trial there have been various references to the Opinion of the Supreme Court in the case of Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796. That case was not a prosecution under the statute involved here and the Supreme Court did not determine any issue which is before you for determination."

That case was cited by the United States Court of Appeals for the Tenth Circuit in *Blau v. United States* (C. C. A. 10), 180 F. 2d 103 at 104 and 105, January 31, 1950 (certiorari granted on May 15, 1950, No. 22, October Term, 1950), for the proposition that the decisions of the Courts presently are to the effect that membership in the party is not of itself an offense. Also, the case of *Dunne v. United States,* Eighth Circuit, 138 F. 2d 137, was cited for the same proposition. Here it may be noted that the position of Patricia Blau was almost identical to that of Dorothy Healey in the present case in that both refused to answer questions before the grand jury on the ground that the answers might tend to incriminate them. She referred to the indictments outstanding against the eleven or twelve party leaders in New York as indicating to her a danger of prosecution if she should testify and answer questions that were put to her before the grand jury. A distinction between the *Foster* case and the *Healey* and

Blau cases is readily apparent from the last page of Defendant's Exhibit "A" marked for identification, wherein the doctrine of William Z. Foster is set forth in black and white. This appears opposite page 323 of the present record as follows:

> "No Communist, no matter how many votes he should secure in a national election, could, even if he would, become President of the present government. When a Communist heads the government of the United States—and that day will come just as surely as the sun rises—the government will not be a capitalist government but a Soviet government, and behind this government will stand the Red army to enforce the dictatorship of the proletariat."

Obviously, this preaches the doctrine of the overthrow of the Government of the United States by force and violence and, therefore, is within the teeth of the Smith Act.

In *U. S. v. Lovett* (1946), 328 U. S. 303, at page 315, the Supreme Court declared that Legislature Acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. Punishing individuals on the basis of membership in the *Communist* Party also constitutes an imputation of guilt by association. Constitutional doubts about the use of guilt by association as a basis for criminal prosecution have been raised by a recent dictum of the Supreme Court in *Bridges v. Wixon* (1945), 326 U. S. 135, at 163 (concurring opinion); also see *Schneiderman v. U. S.*, 320 U. S. 118, 136 (1943).

In the *Wixon* case, Mr. Justice Murphy contends that the deportation statute is unconstitutional as ignoring * * * the traditional American doctrine requiring personal guilt rather than guilt by association. The Court held in this case that *actual adherence* to the unlawful purpose of an organization must be shown, despite the statutory specification that mere affiliation is sufficient.

The *Schneiderman* case arose out of a denaturalization proceeding, which canceled a certificate of citizenship. It was based upon illegal procurement twelve years after it was given, on the ground that petitioner concealed his affiliation with the Communist Party, from the Naturalization Court. He came from Russia in 1908 and in 1922 became a charter member of the Young Workers (now Communist) League of Los Angeles and remained a member until 1930. In 1924, he filed a declaration of intention to become a citizen and his certificate of citizenship was issued in 1927 by the United States District Court for the Southern District of California. In 1925, he had become a member of the Workers' Party, the predecessor of the Communist Party, and his membership continued until the date of the Court's decision in 1943, at which time he was a member of the Party's National Committee and was Secretary of the Party in California. He became organizational secretary of California in 1930, and was the Party candidate for governor in 1932, in Minnesota.

The petitioner denied that he or the Party advocated the overthrow of the Government of the United States by force and violence and that he was not attached to the principles of the Constitution.

The District Court held that the certificate was illegally procured because the organizations to which petitioner

belonged were opposed to the Constitution, and that they taught and advocated overthrow of the Government by force and violence, and petitioner by reason of his membership and participation in their activities was not attached to the principles of the Constitution.

This Circuit Court affirmed on the ground that the certificate was illegally procured, holding that the finding that petitioner's oath was false was not "clearly erroneous."

The Supreme Court reversed all judgments below and held that the Government failed to prove that petitioner's belief on the subject of force and violence were such that he was not attached to the Constitution in 1927. On page 148, the Court said that it had *never passed upon the question, whether the Party does so advocate* (emphasis ours) (overthrow of the Government by force and violence) and it is unnecessary for us to do so now.

It pointed out on pages 154 and 155 that the Government's case was subject to the infirmities of proof by imputation, and its difficulties were increased by the fact that there is no accurate test of what a political party's principles are; that in effect a political party's writings, platforms and programs contain the exaggerated puffing of salesmanship, that bend as the sapling in the face of times and places and issues of the day; that such programs unfortunately are quite often as much honored in the breach as in their observance.[6] Furthermore, the Justices humanly admit they would have to deny their experience as men to recognize official party programs otherwise. The

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[6]Citing Bryce, the American Commonwealth (1915), Volume II, page 334.

Court adds that on the basis of that record, it cannot say that the Communist Party is so different in this respect that its principles advocate with clarity the overthrow of the Government with force and violence.

A footnote on page 154 quotes Mr. Justice Hughes (then Mr.) in opposing the expulsion of the Socialist members of the New York Assembly (1920) by saying:

> "It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of or to the mere intent in the absence of overt acts."

Thus, in the case of Healey and the other appellants, they could have no fear of prosecution by reason of this association with the Los Angeles Communist Party. Nor could they invoke the privilege of silence because certain backers of the party were under indictment or pending trial in New York charged with violations of the Smith Act (*U. S. v. Foster, supra*). As the Court said on page 154 of the *Schneiderman* case "Every utterance of party leaders is not taken for party gospel." Had their testimony before the grand jury disclosed they were members or even officers in the party, it would not have been incriminating. Any prosecution would have to prove not only that the organization advocated the overthrow of Government by force and violence, but that they individually adhered to, advocated or taught such principles, since guilt is personal and may not be imputed by association. Also, before a confession or admission can be introduced in evidence, the *corpus delicti* or body of the crime must be proved, by the weight of authority, which requires no citation. Also, to prove a conspiracy there must be alleged and proved one or more overt acts in furtherance of the

conspiracy to violate some law of the United States. In the cold and realistic analysis of criminal trial practice and procedure—no case could be developed as proved against these appellants from direct yes or no answers to many of the questions herein put to them. Certainly no privilege attached to questions like "Who is Jane Doe? Where does she work? What is her organization? Who is the head of this or that organization or its divisions? or Who has the books and records of any association, if you know?"

Neither can appellants find solace or comfort in other laws of the United States by which to bolster their claim of privilege under these facts.

The McCormack Act of 1938[7] requires agents of foreign principals to register. Registrants must disclose identity of foreign principal, extent of control by foreign Government or political parties, and identity of employees plus information concerning organization and financial affairs. Exempt from the act are those engaging in *bona fide* religious, scholastic or scientific pursuits or fine arts. It is noteworthy that the Communist Party of the United States has neither registered nor has it been prosecuted for failure to register.[8]

The Voorhis Act of 1940[9] is designed to reach subversive organizations and requires registration of those (a) subject to foreign control which engage in *political activity* the aim of which is control by force or overthrow

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[7]52 Stat. 631 (1938) as amended, 22 U. S. C. Sections 611-21 (1946).

[8]Volume 1, No. 1, Stanford Law Review, November 1948, page 94, "Control of Communist Activities."

[9]54 Stat. 1201 (1940), 18 U. S. C., Sections 14-17 (1946).

of the Government of the United States; (b) organizations subject to foreign control which engage in *military activity,* or threats of overthrow by force and violence. Since the registration requirement depends upon proof of purpose to overthrow the Government, the Communist Party of the United States has not been compelled to register nor has it done so under this Act.[10]

The Alien Registration Law of 1940[11] provides for registration on the part of every alien in the United States, disclosure of activities and fingerprinting.

Besides Federal legislation set forth above, the powerful disclosure device of investigation by the House Committtee on un-American Activities has been put to considerable use of late.[12] In the case of *Lawson and Trumbo v. United States,* 176 F. 2d 49, cert. den.; 339 U. S. No. 2 Adv. Sheets at 934 (1950), the Hollywood Ten refused to answer questions before the Committee on whether or not they were Communists, and were held in contempt. Congress acting under its investigative powers for purposes of legislation proceeded upon the premise that the motion picture industry is affected with a public interest in that it is a powerful medium for education or propaganda. The ten writers, being within a key position in the industry, claimed the privilege, notwithstanding their statutory immunity.[13]

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[10]Page 94, Stanford Law Review, Volume 1, No. 1, November 1948.

[11]54 Stat. 670 (1940), 8 U. S. C., Sections 451-60 (1946).

[12]For possible Constitutional limitations on the activities of this committee, see Landis, in 40 Harv. L. Rev. 153 (1926). Also see 47 Columbia L. Rev. 416 (1947) and 33 Cornell L. Quarterly 565 (1948).

[13]See 18 U. S. C. 3486 (*supra*).

In a well considered and excellent article in the new Stanford Law Review on "Control of Communist Activities," Volume 1, No. 1, for November 1948, pages 85-107—both State and Federal legislation as well as many recent cases dealing with the Communist Party are reviewed. It points out on page 95 that the California Subversive Organization Registration Law[14] passed in 1941 appears to be the only state legislation requiring registration of organizations which advocate overthrow of our Government by force or which are subject to foreign control. A California District Court of Appeal has expressed doubt as to its Constitutionality apparently on the ground that the field has been occupied by Federal legislation such as the Voorhies and McCormack Acts.[15]

Sixteen states have enacted legislation to suppress directly the political activity of subversive groups and individuals, addressed in general terms to parties and persons who advocate violent overthrow of the Government or other unlawful interference with its functions. The provisions excluding parties within such a category from the ballot box, from recognition as a political party, and precluding such candidates from holding or running for elective office have been held Constitutional. However, when addressed to persons as parties affiliated with the Communist Party as such, they have failed to clear the Constitutional hurdle when passed upon.[16] Proof of the

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[14]Calif. Corp. Code, Sections 35000-35302 (Deering 1948).

[15]*People v. Noble,* 68 Cal. App. 2d 853, 892, 158 P. 2d 225, 246 (1945).

[16]*Communist Party v. Peck,* 20 Cal. 2d 536, 127 P. 2d 889 (1942) and Stanford Law Review (*supra*), pages 90-91.

violent overthrow theory renders such statutes difficult to put to any effective use.

Other Federal legislation on the subject includes the Espionage Act of 1917[17] and the Non-Communist Affidavit provision o fthe Taft-Hartley Act.[18] The former Act provides heavy penalties for obtaining or disclosing information affecting the National defense with intent or reason to believe the information * * * to be used to the injury of the United States or to the advantage of any foreign nation. The specific intent required is an element of proof. The latter Act is designed to prevent infiltration of Communists into Labor Union positions where they may vote paralyzing strikes in vital industries. This section of the Taft-Hartley Act has been sustained by three Federal Courts[19] and by the United States Court of Appeals for the Seventh Circuit.[20]

In the face of the above enactments, and in particular the Voorhies Act, which brands all registrants as subversives, the Communist Party avowedly severed its affiliation with the Communist International, and the Party Constitution now contains the following provision:

> "Adherence to . . . the activities of any . . . group . . . which conspires or acts to subvert . . . or overthrow any or all institutions of American democracy whereby the majority of the American

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[17]40 Stat. 217 (1917) as amended, 50 U. S. C., Sections 31-42 (1946).

[18]61 Stat. 146, 29 U. S. C. A., Section 159(h), Supp. 1947.

[19] [20]See Footnotes 38 and 39 on page 92 of Stanford Law Review (*supra*).

people can maintain their right to determine their destinies in any degree shall be punished by immediate expulsion." Constitution of the Communist Party of the United States of America, Art. IX, Sec. 2 (1945).

Therefore, since the Communist Party is not an illegal organization under any State or Federal Court, and membership therein is not unlawful by reason of affiliation alone, since the Smith Act and the *Foster* case in New York required proof of intent to overthrow the Government by force and violence, the District Court committed no error in holding that these appellants had no basis, in law or fact upon which to claim the privilege of silence.

Conclusion.

Therefore, the Trial Court committed no error in ordering the witnesses to answer the questions put to them before the grand jury. There was no error in finding that the answers to the questions did not place them in any real or present danger of self-incrimination. The Court took into consideration the immunity expressly offered to each witness for his testimony. It took cognizance of the stated purpose of the grand jury investigation namely, to inquire into the loyalty of certain Government employees pursuant to an Executive Order of the President. The Court penetrated the veil of subterfuge which the appellants claimed herein and decided that the real basis for their refusal to testify was to shield other persons or conceal any knowledge they had concerning the books and

records of the Los Angeles Communist Party. In its ultimate conclusion, it decided that answers to these questions could not possibly harm the witnesses. The Trial Court in such matters was in the best possible position to assess and evaluate the danger that these witnesses claimed in view of all the circumstances. Having come to its conclusions, the Court was justified in holding the appellants in contempt. It is now that we ask this Court of Appeals to sustain these judgments for they should be affirmed.

Respectfully submitted,

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APPENDIX A.

"Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government

Whereas each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

Whereas it is of vital important that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, Therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended .and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

Part I—Investigation of Applicants * * * *

Part II—Investigation of Employees * * * *

Part III—Responsibilities of Civil Service Commission * * * *

Part IV—Security Measures in Investigations * * * *

Part V—Standards * * * *

Part VI—Miscellaneous * * * *

Harry S. Truman

The White House,

March 21, 1947."

(F. R. Doc. 47-2831; Filed, Mar. 24, 1947; 9:45 a.m.)

APPENDIX B.

Sections 2, 3, and 5 of the Act of June 28, 1940, c. 439, 54 Stat. 670, 671, commonly known as the Smith Act, provided in pertinent part as follows:

"Sec. 2(18 U. S. C. (1946 ed.) 10). (a) It shall be unlawful for any person * * * *

(3) to organize or help to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Sec. 3 (18 U. S. C. (1946 ed.) 11). It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title. * * *

Sec. 5 (18 U. S. C. (1946 ed.) 13). (a) Any person who violates any of the provisions of this title shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than ten years, or both. * * *"